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No. 80-1996

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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ANDREW L. FREESE, 2D, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a provision of the statute creating the Sawtooth National Recreation Area, 16 U.S.C. 460aa *et seq.*, that bars the issuance of patents on mining claims on certain public lands constitutes a taking of property within the meaning of the Fifth Amendment where the claim owner took no steps towards obtaining a patent prior to enactment of the statute.

2. Whether Congress provided compensation in that statute for the loss of the option to apply for patents on affected mining claims.

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### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1b-6b) is reported at 639 F.2d 754.

### JURISDICTION

The order granting the motion of the United States for partial summary judgment was entered on January 28, 1981. On March 26, 1981, petitioner filed an untimely motion for review en banc (Pet. App. 1a). See Ct. Cl. R. 151(b). The Court of Claims denied the motion, apparently on the merits, on April 3, 1981 (Pet. App. 1a). The petition for a

writ of certiorari was filed on May 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## STATEMENT

Between 1955 and 1970 petitioner located five mining claims pursuant to the Act of May 10, 1872, ch. 152, 17 Stat. 91, 30 U.S.C. 22 *et seq.*, on public lands in Idaho (Pet. App. 3b). In 1972 Congress enacted a statute creating the Sawtooth National Recreation Area (16 U.S.C. 460aa *et seq.* (hereinafter "the Sawtooth Act")) in an area that included the lands on which petitioner's claims are located (Pet. App. 3b). At the time of the Act's passage, petitioner had made no effort to secure patents on any of his claims (*id.* at 6b).

Section 10 of the Sawtooth Act, 16 U.S.C. 460aa-9, provides that "[s]ubject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States." Section 12 of the Act, 16 U.S.C. 460aa-11, provides that "[p]atents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States."

When petitioner inquired, after passage of the Act, about patenting his claims, he was informed by Department of the Interior officials that the Sawtooth Act precluded the issuance of patents on claims in the recreation area (Pet. 7). He commenced this action in the Court of Claims alleging, among other things, that the statutory bar to his acquiring a patent on his claims constituted a compensable taking of his property under the Fifth Amendment. On cross-motions for partial summary judgment, the Court

of Claims held (Pet. App. 3b-6b) that petitioner's unpatented mining claims entitled him to an exclusive right of possession and enjoyment that was expressly preserved by Section 10 of the Sawtooth Act, but that he had no property right in *patents* on the claims at the time of the Act's passage since he had not then taken even "the first step" towards obtaining them (*id.* at 6b). Accordingly, the court held (*ibid.*) that Congress, in the Sawtooth Act, did not deprive petitioner of any property interest for which compensation was constitutionally required.

## ARGUMENT

The decision of the Court of Claims is correct, and it does not conflict with any decision of this Court or of the courts of appeals. Review by this Court is accordingly not warranted.

1. Under the general mining law of 1872, 30 U.S.C. 22 *et seq.*, individuals may, upon meeting specified conditions, establish mining claims for minerals on certain public lands, and, if they satisfy certain additional conditions, they may obtain patents on the claims. For the purposes of the partial summary judgment motion in this case, the United States did not contest the validity of petitioner's five mining claims, and it is undisputed that those claims, if otherwise valid, were preserved by the savings clause of the Sawtooth Act insofar as they were valid claims.[1] It is also undisputed that petitioner had not, at the time the Sawtooth Act was passed,

[1] The United States, as the holder of paramount title to unpatented public lands, retains authority to challenge the validity of unpatented mining claims such as those held by petitioner. See *United States* v. *Springer*, 491 F.2d 239, 241 (9th Cir.), cert. denied, 419 U.S. 834 (1974).

satisfied the further conditions that would have entitled him to patents on the claims. The Court of Claims correctly held that he had therefore established no entitlement to this separate property interest prior to passage of the Sawtooth Act.

The primary requirement for obtaining a mining claim is to "locate" a valuable mineral deposit in accordance with applicable laws and regulations. *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 606 (1978). One who has established a valid mining claim is entitled to "the exclusive right of possession and enjoyment of all the surface included within the lines of [the] location," and he may extract the minerals found there. 30 U.S.C. 26; *Andrus* v. *Charlestone Stone Products Co., supra*, 436 U.S. at 606. As the Court of Claims correctly noted (Pet. App. 5b), this possessory interest is a property right that Congress may not constitutionally take without providing compensation. *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 644 (1935). Congress, of course, did not take petitioner's possessory interest in his claims because that interest is preserved as an "existing right" by Section 10 of the Sawtooth Act, 16 U.S.C. 460aa-9.

Petitioner's contention that by precluding him from obtaining a patent on his claims after passage of the Sawtooth Act, Congress deprived him of a compensable property interest is not supported by the cases on which he relies (Pet. 8-9) and is refuted by other decisions of this Court. To be sure, *Noyes* v. *Mantle*, 127 U.S. 348 (1888), and *Cameron* v. *United States*, 252 U.S. 450 (1920), refer in dicta to equitable rights of persons with unpatented claims, for whom the government holds title "in trust" (127 U.S. at 351; 252 U.S. at 460-461). But *Benson Mining &*

*Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), makes it clear that petitioner could claim no equitable right in a patent before he had filed an application with all the requisite supporting proofs and proffered the acreage payment required by 30 U.S.C. 29.[2] Thus *Benson*, quoting from an opinion of the Secretary of the Interior, describes (145 U.S. at 430) "three distinct classes of title[]" under the mining laws: (1) fee simple title, obtained through patent; (2) "title by possession," meaning the exclusive possessory rights obtained through establishing a valid claim, which may be defeated if the party in possession fails to comply with the annual work requirements for maintenance of the claim (see 30 U.S.C. 28 *et seq.*); and (3) the "complete equitable title." The significance of the third category is explained by the Court's reference to "well-considered opinions" of Interior Department officials holding that "when the price of a mining claim has been paid the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work, the delay in issuing the patent being a mere matter occurring in the administration of the Land Department, and the patent when issued by relation taking effect as of the date of the purchase" (145 U.S. at 430). As the Court reiterates in *Benson* (*id.* at 431-432), in language later quoted in *Wyoming* v. *United States*, 255 U.S. 489, 497 (1921): "[W]hen the price is paid the right to a patent immediately arises."

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[2] The requirements for a patent include showing a "valuable mineral discovery," marking the boundaries of the claim, providing notice to possible adverse claimants, submitting proof that at least $500 in labor was expended on the claim, and paying a fee equivalent to $5 per acre. 30 U.S.C. 29. See *Ideal Basic Industries, Inc.* v. *Morton*, 542 F.2d 1364, 1369 (9th Cir. 1976).

That theory of the establishment of an entitlement to a patent is consistent with decisions of the Court under the homestead laws that bear directly on the taking issue. See, *e.g.*, *Frisbie* v. *Whitney*, 76 U.S. (9 Wall.) 187 (1870); *The Yosemite Valley Case*, 82 U.S. (15 Wall.) 77, 87 (1873); *Campbell* v. *Wade*, 132 U.S. 34 (1889). As the Court in *Campbell* explained (132 U.S. at 37-38; emphasis added):

> The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preemption laws of the United States, large portions of public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. This subject was fully considered in *Frisbie* v. *Whitney*, 9 Wall. 187, where this doctrine was announced. It was subsequently affirmed in the *Yosemite Valley Case*, 15 Wall. 77, 87, where the court said that *until all the preliminary steps prescribed by law for the acquisition of the property were complied with*, the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land office and payment of its price.

See also *Stockley* v. *United States*, 260 U.S. 532, 540 (1923) (settler entitled to patent on land claimed under homestead laws where he "had done everything which the law required on his part").

When the Sawtooth Act was passed, petitioner had not only failed to pay the acreage fee prescribed by 30 U.S.C. 29, but he had taken none of the preliminary steps to apply for a patent. The power of Congress to preclude the issuance of patents on his claims was therefore in no way impaired. See *United States* v. *Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956) (location of a mining claim gives the locator "only the right to explore for and mine minerals, and to purchase the land *if there has been a compliance with the provisions of the statute*" (emphasis added)). Accordingly, the Court of Claims correctly held (Pet. App. 6b; emphasis in original) that petitioner "suffered [no] unconstitutional divestment solely by virtue of the fact that he no longer has the option *to apply for* patents upon his claims." [8]

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[8] As indicated above, petitioner's reliance (Pet. 8-9) on *Noyes* v. *Mantle*, *supra*, *Cameron* v. *United States*, *supra*, *Stockley* v. *United States*, *supra*, and *United States* v. *Etcheverry*, *supra*, does not advance his argument. His citations to *Reed* v. *Munn*, 148 F. 737 (8th Cir. 1906), cert. denied, 207 U.S. 588 (1907), and *Andrus* v. *Shell Oil Co.*, 466 U.S. 657 (1980), similarly do not aid his case. *Reed* concerned rights of the owners of valid but unpatented mining claims against attacks on the claims themselves during the period prior to patent. The issue in *Shell Oil* was the effect of a savings provision in the Mineral Lands Leasing Act of 1920, 30 U.S.C. 193, on the validity of pre-1920 oil shale mining claims. Unlike the Sawtooth Act, the Mineral Lands Leasing Act provided that existing claims could be "perfected" under the mining laws, and it contained no provision precluding the issuance of patents on claims after the Act's effective date. 30 U.S.C. 193. *Shell Oil* thus decided nothing bearing on the question whether Congress may, without providing compen-

2. Petitioner also appears to argue (Pet. 5) that he is entitled to compensation by the terms of the Sawtooth Act alone. He suggests that Congress in fact recognized the compensability of the option to patent a claim and provided compensation for such interests in Section 13 of the Act, 16 U.S.C. 460aa-12, authorizing some $19 million for "acquisition of lands and interests in lands" for the recreational area and some $26 million for its development. This contention is without merit because it ignores the effect of Section 12 of the Act, precluding the issuance of patents on claims after the effective date of the Act.

The United States already holds title to the land that petitioner seeks to patent (see page 3 note 1, *supra*); and unless Section 12 is a nullity, the only interest that the Secretary of the Interior could acquire from petitioner is his possessory interest in the claims. Congress cannot reasonably be deemed to have appropriated funds for the future acquisition of something that it has simultaneously provided will not thereafter exist.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sation, cut off an unexercised option to apply for a patent on a mining claim.

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